In the

Supreme Court of the United States

October Term, 1971

No. 71-905

HARVEY DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Petitioner, HARVEY DAVIS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on November 12, 1971.

OPINION BELOW

The opinion of the Court of Claims, not yet reported, appears in Appendix A hereto.

JURISDICTION

The judgment of the Court of Claims was entered on November 12, 1971, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under *28 U.S.C. Section 1255 (1).*

QUESTION PRESENTED

May reparation to a career Air Force enlisted man for a "gross miscarriage of justice"[1] through an illegal General Discharge be discriminatively limited to pecuniary benefits he would have received to the date his then current term of enlistment would otherwise have expired, as against the reparation to the date of judgment accorded similarly wronged commissioned officers and certain enlisted men and women with indefinite enlistment terms?

STATUTORY PROVISIONS INVOLVED

10 U. S. C. A., Section 1552.

"Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice * * *"

[1] So held by the Air Force Board for the Correction of Military Records in its decision of February 7, 1967. (See opinion below, Appendix A, pp. 4, 11.)

STATEMENT OF THE CASE

Petitioner, a career enlisted man who first enlisted in the United States Army in 1935, sued unsuccessfully in the United States Court of Claims to recover to the date of favorable judgment,[2] damages based upon pay, allowances, and other pecuniary benefits he would have received had it not been for his illegal General Discharge for alcoholism September 23, 1948.

Petitioner's illegal General Discharge on September 23, 1948, was attended by such circumstances as caused the Air Force Board for Correction of Military Records to characterize the discharge as a "gross miscarriage of justice", even while limiting the relief accorded Petitioner by the Board to a substitution of an Honorable Discharge for his illegal General Discharge.

This substituted Honorable Discharge was by the Secretary of the Air Force backdated to October 16, 1948, the date Petitioner's then current enlistment would have expired had there been no illegal General Discharge — a matter of only some twenty-three (23) days.

The United States Court of Claims held that Petitioner's recovery was limited to pecuniary benefits lost in this minimal period as against Petitioner's contention that he was entitled to recover for the period between the date of his illegal General Discharge, September 23, 1948, until the date of favorable judgment by the United States Court of

[2] Or alternatively to the date of favorable action by the Board for the Correction of Military Records.

[3] See opinion below, Appendix A, p. 13.

Claims,[1] as would be the case under prevailing authority in the Court of Claims for a similarly wronged commissioned officer, or an enlisted man or woman with an indefinite term of enlistment.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES A SIGNIFICANT AND RECURRING PROBLEM RESPECTING FAIR, NONDISCRIMINATORY REPARATION FOR CAREER ENLISTED MEN AND WOMEN IN THE ARMED SERVICES WHO HAVE BEEN ILLEGALLY DISCHARGED.

The Court of Claims decision below rested narrowly upon its prior decision in *Clackum v. United States*, 161 Ct. Cl. 32 (1963), and related decisions.[2]

The rationale of *Clackum* and related cases, while not thusly stated explicitly either in *Clackum* or in the opinion here below, rested squarely upon the concept that the term of an enlisted man's entitlement to pay depends upon his "contract" of enlistment with the Government, so that his benefits under this "contract" terminate with the expiration of his term of enlistment, even if he has been illegally discharged prior to this time.[3]

That this "contract theory" is the *Clackum* and *Davis* rationale is unequivocally demonstrated in *O'Callahan v. United States*, decided December 10, 1971, and not yet reported, which in its slip opinion, page 3, stated, after citing *Clackum* and related cases, "This disposition is based on

[1] Or alternatively to the date of favorable action by the Board for the Correction of Military Records.

[2] See page 5 of Appendix A hereto.

[3] See Note 5, supra.

sound, time honored contract principles, namely that neither party to a contract is bound beyond that for which he has bargained."

This *Clackum-Davis-O'Callahan* rationale we believe to be inherently inconsistent with this Court's rationale in *Bell v. United States*, 366 U.S. 393, 6 L. Ed. 2d 365, 81 Sup. Ct. 1230 (1961). *Bell* reversed a Court of Claims denial of accrued pay and allowances to illegally discharged Korean conflict nonrepatriate American POW's, this Court's unanimous opinion observing that " * * * common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right." (P. 401 of 366 U.S.)

Interestingly, in the same year that *Clackum* was decided, 1963, its inconsistency with *Bell* was noted by Professor Daniel John Meador in his "Judicial Determinations of Military Status" in *72 Yale Law Journal 1293, 1309.*

The Court of Claims did not discuss this inconsistency in the case at bar, nor did it in *O'Callahan*, supra, nor elsewhere, so far as we have been able to determine, although the Court of Claims did cite *Bell* in its opinion in *Dickenson v. United States*, 163 Ct. Cl. 512, where this Korean conflict nonrepatriate was granted recovery, the Court holding that "In the absence of the issuance of a discharge to the Plaintiff by the Army, his status as a soldier was not affected in any way by the expiration of the term of his enlistment * * *" (P. 519).

See page 3 of Appendix B hereto.

There are obviously many military service problems — and not just those of illegally withheld pay and allowances — which could depend upon this Court's resolution in this case of the basic conflict between the contract rationale and the statutory status rationale.

We are, rightly or wrongly, pursuing a national policy bent upon insuring that all our military service personnel be career men and women.

Those enlisted men and women now in military service, and those who shall be importuned to enlist, should be given a more certain definition of such of their rights and responsibilities as may depend upon these being governed by contract, as says the Court of Claims, or by the status accorded by statute, as says the Supreme Court.

2. THE DECISION BELOW IS SUCH A SHOCKING MISCARRIAGE OF JUSTICE THAT IT CANNOT BUT BE HARMFUL TO THE MILITARY SERVICES IN ITS EVENTUAL IMPACT UPON THE PUBLIC AND UPON THE SERVICE MEN AND WOMEN.

A governmentally sanctioned shocking miscarriage of justice to an honorable enlisted man cannot but come in due course to be known in some manner, and in some considerable degree, to the enlisted service, and to that part of the public interested in the enlisted service.

* * * to no good purpose, we must suppose.

The Supreme Court has addressed itself, in granting certiorari, to shocking miscarriages of justice and harsh results, in such cases as *Thompson v. City of Louisville*, 362 U.S.

199; *Washington v. United States*, 357 U.S. 348; and *Montana v. Kennedy*, 366 U.S. 308, 309.

We are confident that a fuller briefing will disclose that the Air Force Board for Correction of Military Records was fully justified in characterizing Petitioner's illegal General Discharge as a "gross miscarriage of justice", which did indeed become shocking when the Court of Claims denied adequate remedy upon an outmoded and discredited common law contract rationale.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 247-69

(Decided November 12, 1971)

HARVEY DAVIS v. THE UNITED STATES

Joel W. Westbrook, attorney of record, for plaintiff. *William H. Ferguson*, *Arthur Mitchell*, *Philip E. McCleery* and *James N. Quin, Jr.*, of counsel.

Charles M. Munnecke, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON and NICHOLS, *Judges*.

OPINION

PER CURIAM: This case was referred to Trial Commissioner Mastin G. White with directions to make findings of fact and recommendation for conclusions of law under the order of reference and Rule 134(h). The commissioner has done so in an opinion and report filed on January 26, 1971. Exceptions to the commissioner's opinion, findings and recommended conclusion of law were filed by plaintiff and the case has been submitted to the court on the briefs of the parties and oral argument of counsel.

Since the court agrees with the commissioner's opinion, findings of fact and recommended conclusion of law, as hereinafter set forth, it hereby adopts the same as the basis for its judgment in this case. Therefore, plaintiff is not entitled to recover and the petition is dismissed.

448-020—71

OPINION OF COMMISSIONER

WHITE, *Commissioner:* This is a military pay case in which the plaintiff, who was a career soldier from 1935 until 1948, is suing "for all his pay, allowances, compensation, emoluments, and other pecuniary benefits which he would have received" if he had continued in an active duty status from 1948 until May 3, 1967, at least.

It is my opinion that the plaintiff is not entitled to recover.

The plaintiff enlisted in the Army on May 1, 1935. He continued in the military service, under successive reenlistments, until 1948, when he was discharged under circumstances that will be related subsequently in this opinion. The plaintiff's final reenlistment was on September 26, 1945, and was for a 3-year term.

As the plaintiff was serving in the Army Air Forces at the time in 1947 when that organization was converted into a separate service designated as the United States Air Force, the plaintiff thereupon became a member of the Air Force, and he served in the Air Force until he was discharged from the military service in 1948.

From the time of his original enlistment in 1935 until September of 1946, the plaintiff made an excellent record in the military service, attaining the grade of master sergeant. During World War II, he served with the Army Air Forces in the Pacific Theater of Operations; he participated in a number of combat missions; and he was awarded the Distinguished Flying Cross.

In September of 1946, while the plaintiff was serving as a master sergeant at Williams Air Force Base in Arizona, he began drinking intoxicating liquor to excess. He became an alcoholic, and this drinking problem continued until he was released from the military service in 1948.

After September of 1946, the plaintiff's record in the military service was poor, being characterized by frequent intoxication and absences. He was hospitalized for alcoholism in the base hospital at Williams Air Force Base during the periods March 14–18, 1947, September 11–13, 1947, October 22–27, 1947, and June 10–16, 1948. On November 5, 1947, the plaintiff was reduced from the grade of master sergeant to the grade of private because of absences and intoxication.

A board of officers was convened at Williams Air Force Base on September 14, 1948, to determine whether the plaintiff should be discharged from the service under the provisions of AR 615–368 prior to the expiration of the plaintiff's then-current term of enlistment. (Such term of enlistment, adjusted for time lost by the plaintiff due to absences, was scheduled to expire automatically in about a month.) The plaintiff appeared before the board, with his counsel, but he did not testify. The board heard the testimony of four witnesses, and also had before it the service record and allied papers relating to the plaintiff, plus a number of additional documentary exhibits.

After the hearing, the board of officers initially voted 3-to-2 to recommend that the plaintiff not be discharged from the service prior to the expiration of his then-current enlistment term. However, after the initial vote was taken, and as a result of command influence being exerted on the board by the commanding officer of the base hospital at Williams Air Force Base, the board changed its vote; the board officially found that the plaintiff "possesses habits which render his retention in the service undesirable"; and the board recommended that the plaintiff "be discharged from the service prior to the expiration of his term of service for habits which render retention in the service undesirable," and "that WD AGO Form 53–58, General Discharge, be furnished."

Pursuant to the recommendation of the board of officers, the plaintiff was given a general discharge from the Air Force effective September 23, 1948. (The 3-year term of the plaintiff's final enlistment, adjusted for time lost by the plaintiff due to absences, would have extended for an additional period of 23 days beyond September 23, 1948, in the absence of the discharge.)

On July 30, 1966, the plaintiff sought relief from the Air Force Board for the Correction of Military Records, on the ground that he had been discharged unjustly and illegally because the board of officers in 1948 had yielded to command influence in recommending that he be given a general discharge prior to the end of his then-current term of enlistment. The plaintiff supported his application by submitting a brief prepared by counsel, a written statement from the person who had served as the plaintiff's counsel before the

board of officers in 1948, and written statements from two persons who had served as members of the 1948 board.

After considering the material which the plaintiff had submitted, the Air Force Board for the Correction of Military Records announced its decision on February 7, 1967. The Correction Board found that the plaintiff "has suffered an injustice," and that "a gross miscarriage of justice has taken place," because of the exertion of undue influence upon the board of officers by higher authority in 1948. The Correction Board recommended that the plaintiff's military records "be corrected to show that he was discharged under honorable conditions on 23 September 1948 * * * and furnished an Honorable Discharge Certificate."

On the basis of the Correction Board's recommendation (as subsequently modified with respect to the effective date of the plaintiff's discharge), the plaintiff's military records were corrected on May 3, 1967, to show that he continued in the active military service until October 16, 1948, and that he was given an honorable discharge on such date. (The 3-year term of the plaintiff's final enlistment was extended for 21 days beyond its normal expiration date of September 25, 1948, because of time lost by the plaintiff due to absences.)

As determined by the Air Force Board for the Correction of Military Records, the plaintiff was done an injustice by the Air Force in 1948. The injustice consisted of the improper injection of command influence into the administrative process, and it resulted in the plaintiff being given a general discharge from the military service on September 23, 1948, or 23 days before the term of his then-current enlistment (as adjusted for time lost by the plaintiff due to absences) was scheduled to expire. In the absence of the improper command influence, the plaintiff would have been permitted to serve for the remainder of the enlistment term; he would have received pay and allowances for the additional 23 days; and he would have been given an honorable discharge at the end of the enlistment term.

The Air Force has attempted to make amends for its unfair treatment of the plaintiff by replacing the plaintiff's general discharge with an honorable discharge, by changing the official records to show that the plaintiff's military status con-

tinued until the end of his final enlistment term on October 16, 1948, and by compensating the plaintiff for the 23-day period between the date of his improper release and October 16, 1948.

The plaintiff contends, however, that when the Air Force, in replacing his improper general discharge with a proper honorable discharge, purported to make the honorable discharge retroactive to October 16, 1948, such action was legally ineffective. From this premise, the plaintiff argues that he was not effectively discharged from the military service until May 3, 1967, when final action was taken on the correction of his military records; and, accordingly, that he is entitled to receive his pay and allowances as a member of the military service until May 3, 1967, at least.

The plaintiff's contention is not supported by the existing judicial precedents. In a situation where an enlisted person has been illegally discharged from the military service during the term of an enlistment, this court has uniformly limited recovery to the period between the date of the illegal discharge and the date when the term of the enlistment would ordinarily have expired in the absence of the wrongful discharge (*e.g.*, *Murray* v. *United States*, 154 Ct. Cl. 185, 191 (1961); *Smith* v. *United States*, 155 Ct. Cl. 682, 691 (1961); *Clackum* v. *United States*, 161 Ct. Cl. 34, 36 (1963); *Sofranoff* v. *United States*, 165 Ct. Cl. 470, 479 (1964)).

In connection with the point mentioned in the preceding paragraph, the case of *Garner* v. *United States*, 161 Ct. Cl. 73 (1963), should be noted. The claimant in that case was serving in the Air Force under an indefinite enlistment that had no expiration date. She was illegally discharged from the service on January 22, 1952. Subsequently, the claimant was given another discharge effective March 10, 1961. It appearing that the second discharge was valid, this court held that the claimant was entitled to compensation for the period beginning January 23, 1952, and ending March 10, 1961. As the claimant's enlistment had no fixed term, it was the issuance of a valid discharge which terminated the enlistment and ended the period for which she was entitled to recover compensation.

In the present case, the plaintiff was serving under an enlistment which had a fixed term, and such term (as adjusted

for time lost by the plaintiff due to absences) would have expired on October 16, 1948, in the absence of the Air Force's improper action in discharging the plaintiff with a general discharge on September 23, 1948. This court lacks the power to extend the term of the plaintiff's enlistment beyond the date in 1948 when it was scheduled to expire. Furthermore, the court lacks the power retroactively to reenlist the plaintiff in the Air Force for any succeeding term.

In this connection, the plaintiff asks the court to speculate that if he had been permitted to continue on active duty until October 16, 1948, and had then been given an honorable discharge upon the expiration of that particular enlistment, he would have continued in the military service under successive reenlistments until retirement. While the evidence in the record indicates that the plaintiff would probably have attempted to reenlist in October 1948, the evidence certainly does not warrant a finding that the Air Force would necessarily, or even probably, have regarded the plaintiff as an acceptable reenlistee in October 1948. It has previously been mentioned in this opinion that the plaintiff's military record during the 2-year period before October 1948 was poor, having been characterized by intoxication, hospitalization for alcoholism, absences, and being reduced to the grade of private from that of a noncommissioned officer. In view of this, the plaintiff's present contention that he would have been accepted by the Air Force for reenlistment in October 1948 if he had not been given a general discharge on September 23, 1948, cannot be accepted as an established fact.

Under the existing judicial precedents, the plaintiff is not entitled to recover the pay and allowances of a person in the military service for the period after October 16, 1948. Accordingly, the petition should be dismissed.

Findings of Fact

1. Harvey Davis ("the plaintiff") was born on July 7, 1905.

2. (a) The plaintiff enlisted in the Army on May 1, 1935. He continued in the military service under successive reenlistments until 1948, when he was discharged under circumstances to be related in subsequent findings.

(b) The plaintiff served overseas in the Pacific Theater of Operations during World War II. He was assigned at the

time to the Army Air Forces; he participated in a number of combat missions; and he was awarded the Distinguished Flying Cross.

(c) The plaintiff's final reenlistment in the military service was on September 26, 1945, and was for a term of 3 years. At that time, he was serving with the Army Air Forces in the grade of master sergeant.

(d) The plaintiff's military occupational specialty was in the area of aircraft maintenance. The character of his active military service was uniformly excellent, up until about September of 1946.

(e) With the transformation of the Army Air Forces into a separate military service designated as the United States Air Force, the plaintiff became a member of the Air Force.

3. (a) In September of 1946, while the plaintiff was stationed at Williams Air Force Base, Arizona, the plaintiff started drinking intoxicating liquors to excess. He became an alcoholic, and this drinking problem continued to the date of his release from the military service in 1948.

(b) During the plaintiff's active military service, the alcoholism that began in 1946 was the only problem that adversely affected the quality of his service.

4. (a) The plaintiff was hospitalized for alcoholism in the base hospital at Williams Air Force Base during the period March 14–18, 1947.

(b) The plaintiff was hospitalized for alcoholism again in the base hospital at Williams Air Force Base during the period September 11–13, 1947.

5. (a) On September 10, 1947, the plaintiff's commanding officer initiated action to reduce the plaintiff in grade because of absences and intoxication.

(b) Pursuant to the action referred to in paragraph (a) of this finding, a promotion and reduction board was convened under the authority of AR 61–5.

(c) On the basis of the board's recommendation, the plaintiff was reduced from the grade of master sergeant to the grade of private for cause on November 5, 1947.

6. The plaintiff was hospitalized for alcoholism a third time in the base hospital at Williams Air Force Base during the period October 22–27, 1947.

7. The plaintiff was promoted to corporal on April 28, 1948.

8. The plaintiff was hospitalized for alcoholism a fourth time in the base hospital at Williams Air Force Base during the period of June 10–16, 1948.

9. The plaintiff was reduced from the grade of corporal to the grade of private on July 8, 1948, because of alcoholism.

10. (a) The plaintiff asked to be sent to a general hospital for treatment of his condition of alcoholism. His request was denied.

(b) In connection with the plaintiff's desire to be sent to a general hospital, the commanding officer of the base hospital at Williams Air Force Base made the following statements in a communication dated August 12, 1948, and addressed to the commanding officer of the plaintiff's unit:

> 2. It is obvious that the Airman is a confirmed chronic alcoholic and his rehabilitation is considered impossible. In addition to the above hospital admissions, the Airman has been seen on several other occasions and given treatment as an outpatient for the effects of alcoholism.
>
> 3. When not under the influence of alcohol the Airman apparently performs his duties in a satisfactory manner, but upon the slightest provocation or when he is placed under any stress he immediately resorts to the excessive use of alcohol as an escape mechanism. His treatment in a general hospital is not indicated and immediate action to dispose of this Airman, as recommended above, should be instituted.

11. (a) A board of officers convened at Williams Air Force Base on September 14, 1948, to determine whether the plaintiff should be discharged from the service under the provisions of AR 615–368.

(b) The plaintiff appeared before the board of officers, with his counsel, but he did not testify.

(c) Four witnesses testified before the board of officers, under oath. In addition, the board of officers had before it the service record and allied papers relating to the plaintiff, and a number of additional documentary exhibits.

(d) After the hearing, the board of officers initially voted 3-to-2 to recommend that the plaintiff not be discharged from the service prior to the end of his then-current period of enlistment.

(e) After the initial vote of the board of officers was taken, and as a result of command influence being exerted on the board of officers by the commanding officer of the base hospital at Williams Air Force Base, the board of officers changed its vote and on September 14, 1948, made the following finding and recommendation:

> That Private Harvey Davis * * * possesses habits which render his retention in the service undesirable, and attempts to rehabilitate the airman have failed.
>
> * * * * * * * * *
>
> That Private Harvey Davis * * * be discharged from the service prior to the expiration of his term of service for habits which render retention in the service undesirable. It is further recommended that WD AGO Form 53-58, General Discharge, be furnished.

12. (a) Pursuant to the recommendation of the board of officers, the plaintiff was given a general discharge effective September 23, 1948.

(b) As of September 23, 1948, the plaintiff had completed 12 years and 11 months of active military service.

13. The Air Force Discharge Review Board met on June 14, 1949, to consider the plaintiff's discharge. The Review Board reviewed the record, and considered supplementary statements submitted by or on behalf of the plaintiff. The Review Board found that the action of the board of officers was amply supported by the evidence, and that there was no additional evidence to warrant reversal.

14. Immediately after being discharged from the military service, the plaintiff sought and received professional help for his alcoholism at the Samaritan Sanitarium in Houston, Texas. This professional treatment was successful in enabling the plaintiff to overcome his alcoholism from November 1948 until 1950.

15. After having overcome his alcoholism in the latter part of 1948, the plaintiff endeavored to reenlist in the Air Force. However, in view of the nature of his 1948 discharge from the military service, reenlistment was possible only on the basis of a waiver from the Secretary of the Air Force. The plaintiff applied for such a waiver, and he sought and obtained the support of a Senator and a Congressman from

Texas on his behalf, but the Secretary of the Air Force declined to grant the requested waiver.

16. The plaintiff sought the assistance of the Veterans Administration in an attempt to have the nature of his discharge from the military service changed from general to honorable. This attempt was not successful.

17. After the failure of the plaintiff's initial attempts to reenlist in the Air Force and to have the nature of his discharge from the military service changed, the plaintiff again succumbed to the excessive use of alcohol in 1950.

18. The character of the plaintiff's discharge had a definitely detrimental effect on the plaintiff, manifesting itself in a feeling of disgrace and a feeling of insecurity in positions of employment. Thus, it had an adverse effect on his ability to perform gainful employment.

19. During the period between 1950 and 1961, the plaintiff alternated between periods of alcoholism and periods of remission from this difficulty. In 1961, the plaintiff succeeded in overcoming his alcoholism on a more permanent basis, and he has not had a drinking problem since 1961.

20. The plaintiff has been regularly and gainfully employed since 1961.

21. (a) On June 3, 1965, the plaintiff applied to the Air Force Board for the Correction of Military Records, requesting that his 1948 general discharge from the military service be changed to an honorable discharge.

(b) This application was denied on August 20, 1965.

22. (a) Under the date of July 30, 1966, the plaintiff again sought relief from the Air Force Board for the Correction of Military Records. In the "Request" block of the application form, the plaintiff made the following statement:

> According to information, and affidavits supporting same, received after the Board Proceedings, which resulted in my discharge, I have information that the vote to retain me in the Service, by a majority of the Board was changed due to Command influence, and as a result thereof, I was discharged unjustly and illegally.

(b) The plaintiff supported his application of July 30, 1966, by submitting a brief prepared by his counsel, a written statement made by the officer who had served as his counsel before the board of officers in 1948, and two written state-

ments made by persons who had served as members of the board of officers.

(c) The Air Force Board for the Correction of Military Records initially met on January 27, 1967, and considered the material which the plaintiff had submitted. The decision of the Correction Board was announced on February 7, 1967.

(d) The Correction Board made findings as follows:

> * * * [A]pplicant has suffered an injustice. According to the supporting statements submitted by applicant's defense counsel * * * and two members of the Board of Officers which heard applicant's case in September, 1948, * * * the original vote of that particular Board was to retain applicant on active duty. Because of undue influence which apparently was exerted upon one of the Board members by higher authority, the vote was changed which resulted in applicant's discharge from the service as an undesirable. The Correction Board accepts these supporting affidavits, and considers a gross miscarriage of justice has taken place. It is also noted that the basic reason for the discharge action was that applicant was unable to perform his duty because of excessive use of alcohol. When applicant was discharge [sic] in 1948, alcoholism was classified by the military authority as a personality disorder, and not as a disease as it is today. Members of the Armed Forces who are discharged today for chronic alcoholism are separated from the service under honorable conditions. * * * In the interest of justice and equity, the Board recommends that the General Discharge be removed and his records be changed to show he was discharged for the convenience of the Government and furnished an Honorable Discharge Certificate on 23 September 1948.

(e) The Correction Board made the following recommendation:

> 1. The pertinent military records of the Department of the Air Force relating to HARVEY DAVIS, AF 6256428, be corrected to show that he was discharged under honorable conditions on 23 September 1948 under the provisions of AR 615-360 for the convenience of the Government and furnished an Honorable Discharge Certificate.

23. (a) Under the date of February 17, 1967, the plaintiff's counsel addressed a letter to the Air Force Board for the Correction of Military Records, asking that "recognition

[be] given that Harvey Davis has been legally on active status in the United States Air Force all of this time and at least up until the date, at the present time, when Harvey Davis is legally discharged from the Air Force"; that "all pay, allowances, compensation, emoluments, and other pecuniary benefits to which he is entitled by reason of not having been discharged legally" be computed and paid to him; and that his "rights to retirement pay, subsequent to the effective date of any legal discharge which he might receive from the United States Air Force," be recognized.

(b) After considering the request set out in paragraph (a) of this finding, the Correction Board rendered its decision on April 24, 1967, and made the following findings:

> 5. The Board finds no legal basis for correcting the record to show applicant has been on active duty to the present time, and that he be paid all payments due him by reason of the fact that his active duty status has never ceased under law. Moreover, the Board finds no equitable basis for agreeing with applicant's contention that he should be retained on active military service past the term of his enlistment. * * *
>
> 6. * * * It is the conclusion of the Board that an error and injustice has been demonstrated. Applicant's records should be corrected to show he was permitted to serve to the expiration of his term of enlistment and furnished an Honorable Discharge Certificate.

(c) The Correction Board made the following recommendation in its decision of April 24, 1967:

> 1. The pertinent records of the Department of the Air Force relating to Harvey Davis, AF 6256428, be corrected to show that he was not discharged on 23 September 1948, but that he continued in active military service and was discharged on 18 December 1948 under the provisions of paragraph 2a, AR 615–360, and furnished an Honorable Discharge Certificate.

24. (a) On April 25, 1967, the Under Secretary of the Air Force issued the following directive:

> 1. The pertinent records of the Department of the Air Force relating to Harvey Davis, AF 6256428, be corrected to show that he was not discharged on 23 September 1948, but that he continued in active military service and was discharged on 18 December 1948 under the provisions of paragraph 2a, AR 615–360, and furnished an Honorable Discharge Certificate.

(b) The plaintiff was advised of the Under Secretary's action on April 26, 1967.

25. By means of an action dated May 3, 1967, the Under Secretary of the Air Force voided the directive of April 25, 1967 (see finding 24(a)), and substituted for it the following directive:

> 2. The pertinent records of the Department of the Air Force, relating to HARVEY DAVIS, AF 6256428, be corrected to show that he was not discharged on 23 September 1948, but that he continued in active military service and was discharged on 16 October 1948 under the provisions of paragraph 2a, AR 615-360, and furnished an Honorable Discharge Certificate.

26. On May 5, 1967, the following communication was sent to the plaintiff by the Executive Secretary of the Air Force Board for the Correction of Military Records:

> The Directive signed by the Under Secretary of the Air Force on 25 April 1967 has been corrected to show your discharge date as 16 October 1948.
>
> Your military records show you enlisted for a period of three (3) years on 26 September 1945. During this enlistment you had a total of 21 days lost time. Therefore, your enlistment would normally have terminated on 16 October 1948.

27. Prior to instituting the present action, the plaintiff exhausted all the administrative remedies available to him.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is not entitled to recover, and the petition is dismissed.

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APPENDIX B

In the United States Court of Claims

No. 399–69

(Decided December 10, 1971)

JAMES F. O'CALLAHAN v. THE UNITED STATES

Victor Rabinowitz attorney of record for plaintiff. *Kristin Booth Glen* and *Rabinowitz, Boudin & Standard*, of counsel.

Charles M. Munnecke, with whom was *Assistant Attorney General L. Patrick Gray, III*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

In this action under 28 U.S.C. § 1491, plaintiff seeks payment of military pay and allowances for the entire period from the date of his illegal discharge to the date of decision in this court. On October 11, 1956, while serving an enlistment due to expire on March 8, 1961, plaintiff was convicted by general court-martial of attempted rape, housebreaking, and assault with intent to rape, and sentenced to ten years confinement, dishonorable discharge, and forfeiture of all pay and allowances. On June 2, 1969, the Supreme Court, on writ of habeas corpus, reversed the conviction in *O'Callahan v. Parker*, 395 U.S. 258 (1969), holding that the jurisdiction of military courts-martial could not constitutionally extend to the alleged criminal conduct which was not "service-connected," and was committed out of uniform, on leave, off the military base and in a district, Hawaii, where civil courts

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were open. It held that plaintiff was denied his right to trial in such a civilian tribunal with the attendant rights of an indictment by a grand jury and a trial by jury. This decision voided the conviction and sentence, including plaintiff's dishonorable discharge.

On October 6, 1969, plaintiff commenced this action, proceedings in which were stayed in order for plaintiff to seek a review by the Board For The Correction Of Military Records (hereafter Board) to settle plaintiff's military status. The Under Secretary of the Army, under date of January 12, 1971, and pursuant to Board recommendation, has nullified plaintiff's dishonorable discharge; discharged him honorably as of March 8, 1961, the expiration date of his enlistment contract in force at the time of his purported conviction; and denied him any connection with the Army after March 8, 1961.

Plaintiff says the Under Secretary of the Army abused his discretion in backdating the discharge to the end of the enlistment, and urges that he had never been properly discharged from the service until the time of action of the Board. The Government insists that the Secretary acted wholly within his discretion and, in any event, any cause of action accrued more than six years before this action was filed. Thus, the Government argues, the six-year statute of limitations on actions in this court, 28 U.S.C. § 2501 (1970), precludes this claim.

In order to reach the statute of limitations issue we must dispose of the threshold question of the time of accrual of the cause of action which requires analysis of the decisions of the Board and the Secretary.

The plaintiff's position proceeds as follows: when the Board replaced his dishonorable discharge with an honorable one, it attempted to make the discharge retroactive to March 8, 1961. Plaintiff says it can do the first but not the second. Since he had never been properly discharged before the date of the correction, that date should be the effective date of his new discharge. Thus, plaintiff continues, he is entitled to all pay and allowances for the intervening time. This line of logic has been argued before this court on many occasions and it has been consistently rejected, the court uni-

formly limiting recovery for unlawful discharge to the period between the date of the discharge and the date of the expiration of the enlistment contract had the prior defective discharge not occurred. *E.g.*, *Middleton* v. *United States*, 170 Ct. Cl. 36 (1965); *Sofranoff* v. *United States*, 165 Ct. Cl. 470 (1964); *Clackum* v. *United States*, 161 Ct. Cl. 34, (1963); *Smith* v. *United States*, 155 Ct. Cl. 682 (1961); *Murray* v. *United States*, 154 Ct. Cl. 185 (1961). This disposition is based on sound, time-honored contract principles, namely that neither party to a contract is bound beyond that for which he has bargained. Cases cited by plaintiff support this view. In *Garner* v. *United States*, 161 Ct. Cl. 73 (1963), the enlistment in question was indefinite, having no expiration date; therefore the date of the second, proper honorable discharge was used as the benchmark for determining the amount of recovery due.

Officers' commissions are generally of indefinite duration. *Shaw* v. *United States*, 174 Ct. Cl. 899, 357 F. 2d 949 (1966), indicates that an *officer* remains an officer indefinitely, despite invalid conviction and discharge. In *Motto* v. *United States*, 172 Ct. Cl. 192, 348 F. 2d 523 (1965), and again in *Hamlin* v. *United States*, 183 Ct. Cl. 137, 391 F. 2d 941 (1968), the claimants also held commissions of indefinite duration. We determined, for reasons that will appear, that the Board review was a mandatory step, without which plaintiffs had no cause of action and therefore that the date of the Board's decision was the date of accrual of the action since no other reasonable one was available. One judge in *Hamlin* would have predicated the result on different grounds, not here applicable. A distinguishing fact in *Motto* and *Hamlin*, we think, is the different status of persons in the Armed Forces, who have *indefinite* commissions.

The *Motto* and *Hamlin* plaintiffs were Army officers who had been civilly convicted for bribery. Later the Secretary of the Army dismissed them, because 18 U.S.C. § 202 automatically forfeits offices such as theirs in case of conviction for that kind of offense. Still later the District Court voided their convictions, but *McMullen* v. *United States*, 100 Ct. Cl. 323 (1943), *cert. denied*, 321 U.S. 790 (1944), stood as authority that the forfeiture remained effective despite such void-

ance, and without administrative correction, it followed that a suit here would not lie. The Secretary corrected their records, giving honorable discharges, effective the dates of dismissal, but a majority of this court held that plaintiffs could simultaneously take advantage of the new discharge and repudiate the effective date the Secretary had selected. The cases turned on the unique legal situation presented and do not establish any general rule that corrective honorable discharges cannot be backdated when it is reasonable and not arbitrary or capricious to backdate.

Juhl v. *United States*, 181 Ct. Cl. 210, 383 F. 2d 1009 (1967), *rev'd. on other grounds, sub nom. United States* v. *Augenblick*, 393 U.S. 348 (1969), is the only case cited by plaintiff as authority for the proposition that enlisted men are entitled to recover back pay withheld, when illegally convicted, to the day of judgment. Plaintiff overlooks the finding of fact in that case that Juhl was still connected with the service at the time of judgment, though at a lower grade as a result of the alleged illegal conviction.

Plaintiff asks this court to find the actions of the Board and the Secretary in "backdating" his discharge to the date of enlistment expiration to be arbitrary, capricious and outside the discretion vested with their offices. The issue, most clearly stated, is whether the Secretary of any service arm is required to postulate a re-enlistment without exercise of discretion in individual cases. We think that he is not. The principles of efficient management, maintenance of morale, and the continued public trust in our Armed Services require that more substantial discretion be left in the hands of those who manage and maintain the Armed Services. Assume for the moment that plaintiff's conviction had been voided prior to the end of his enlistment and that he were free at that time to apply for re-enlistment, and that he actually harbored the intent to do so. We may note that in *O'Callahan* the Supreme Court does not pretend to be correcting an unjust conviction. It starts right out by reciting that he committed the offenses charged. Would the Secretary have been compelled to accept plaintiff's enlistment, knowing what he had done? Again, we think not. *Cf. Davis* v. *United States*, ___ Ct. Cl. ___ (decided November 12, 1971).

Plaintiff urges that *Diamond* v. *United States*, 170 Ct. Cl. 166, 344 F. 2d 703 (1965) stands for the proposition that "an enlisted man has a *right* to reenlist within six months of the expiration of a past enlistment." (Emphasis in original.) This is true, *under the conditions existing in Diamond*. Diamond's right to re-enlist was a statutory one (Act of July 14, 1939, ch. 267, 53 Stat. 1001) granted to enlisted men who had served as officers and who had made timely application under the terms of the statute. Plaintiff here meets neither of these criteria. The only other case cited by plaintiff in support of his right-to-reenlist contention is *Smith* v. *United States*, *supra*, where another statute (Act of August 10, 1946, Sec. 2, 60 Stat. 993) granted limited Reserve reenlistment rights to those servicemen who had served to within two years of retirement. Again, plaintiff does not fit the mantle tailored by the statute.

The issue of when an action based on an alleged illegal discharge accrues is not new to this court. In *Mathis* v. *United States*, 183 Ct. Cl. 145, 391 F. 2d 938 (1968), we held it accrued all at once on the date of discharge. *Cf. Kirk* v. *United States*, 164 Ct. Cl. 738 (1964), in which we assumed a continuing claim to the expiration of the enlistment in a case where it made no difference. In both cases we stated the usual rule to be that resort to the Correction Board was not mandatory and therefore did not defer or toll the statute of limitations. The fact that a Board administratively changed the date of the discharge does not alter the time of accrual of the action, or at least does not extend it beyond the new discharge date. *Goldstein* v. *United States*, 131 Ct. Cl. 228, 130 F. Supp 330, *cert. denied*, 350 U.S. 888 (1955). We have repeatedly held, as in *Mathis*, *supra*, at 148, that it is a "recognized, oft-repeated principle that optional administrative remedies do not defer or toll the statute of limitations." To hold otherwise would serve to induce a potential claimant to sit on his right of action, while running the gauntlet of permissive reviews through Boards of Review, Correction or Appeal, all the while running up pay and allowances, before finally seeking relief in the Court of Claims. *See. Crowe* v. *United States*, Ct. Cl. , decided today. This is not within the spirit or intention of statutes of limitation.

Plaintiff's claim that he was compelled to first gain his freedom before pursuing his claim in this court, though understandable, is not persuasive. Factually, it was admitted at oral argument that plaintiff was out of jail for a substantial time, was then reincarcerated for a parole violation, and petitioned for habeas corpus in 1966. However, there are numerous cases where prisoners confined in penal institutions at all pertinent times have prosecuted their claims in this court. *E.g.*, *Webster* v. *United States*, 179 Ct. Cl. 917 (1967); *Smith* v. *United States*, 168 Ct. Cl. 242 (1964). "Imprisonment is not a legal disability under 28 U.S.C. § 2501, which would extend plaintiff's time for filing suit." *Grisham* v. *United States*, 183 Ct. Cl. 657, 664, 392 F. 2d 980, 984 (1968). Moreover, plaintiff's attempts to invalidate his illegal discharge and recover back pay were "in no sense dependent upon * * * first securing a reversal of the court-martial convictions, * * *." *Jackson* v. *United States*, 179 Ct. Cl. 29, 37, *cert. denied*, 389 U.S. 985 (1967). This court, over the last quarter century, has repeatedly asserted its power to review court-martial convictions when associated with a money claim. *Shaw* v. *United States*, *supra*, and cases cited at 904, fn. 4; *Shapiro* v. *United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947), whatever the extent of such power may now be. It does not appear from the record that plaintiff was in any way prevented from filing his claim for a money judgment in this court at least simultaneously with his writ of habeas corpus proceedings in another forum (or, preferably, before then, for it appears that a filing even at that time may have been too late). The relief he now seeks was available in this forum at the time of his convictions. It would appear from *Wallace* v. *United States*, 161 Ct. Cl. 446 (1963), in which we held that a person illegally convicted by a court-martial could recover the fines it assessed against him. We can find no jurisdiction for granting it now, sought some ten years later.

Plaintiff's counsel eloquently sounds a theme often heard in this court: that it is absurd to say that a person has forfeited a right of action before he ever had one, holding limitations to have run before some landmark decision, without

which the action was not practically maintainable. In effect, he says, O'Callahan had no viable right to sue here until the Supreme Court gave him one in 1969, that the cause of action accrued then, and limitations started to run at no earlier date. Even on plaintiff's major premises, the date is debatable. The drive against expanded court-martial jurisdiction, in our highest court, may be said to have got well under way with *Toth* v. *Quarles*, 350 U.S. 11, in 1955, amply soon to give the evidently prescient O'Callahan a timely cue. Plaintiff believes, evidently, that the Supreme Court changed the Constitution all at once in 1969, a belief in which he is not alone, for it is in part shared by the dissenting justices in *O'Callahan*, among others. However, we doubt if plaintiff's argument to the Supreme Court was along the line of urging it to change the Constitution. There is nothing in the prevailing opinion, *e.g.*, the express overruling of any prior decision, to show that change was consciously in the Court majority's program. Rather it seeks to show that the change has been in military practice, with a subtle expansion of court-martial jurisdiction over the years having been enacted by the Congress, reaching beyond the concepts of the founding fathers as to proper court-martial jurisdiction. Nor does Mr. Justice Harlan's vigorous dissent point to any prior decision as being overruled outright. Plaintiff's position, that a decision such as *O'Callahan* accrues a cause of action if it was not practically maintainable under prior law, perhaps may seem a corollary to the view that the retroactive effect of *O'Callahan* in invalidating previous court-martial sentences should be limited, but the considerations involved in adjudicating these issues are different and there is no reason why the answers should have to conform. The view plaintiff urges here does not have the support of authoritative precedents, as does (in other contexts) limiting the retroactive effect of decisions, and he asks this "inferior" tribunal (in the language of Article III) to be the first to skate upon what appears to be singularly thin ice. The venture requires one with a more robust view of its mission and possessing more expansive powers. We believe that in our system innovation of such magnitude is a prerogative of the Supreme Court alone. Our statute of limitations, 28 U.S.C. § 2501, is jurisdictional and

we cannot restructure it to satisfy our own ideas of what is right and just.

Defendant's motion for summary judgment is granted. Plaintiff's motion for summary judgment is denied. The petition is dismissed.

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No. 71-995

In the Supreme Court of the United States

OCTOBER TERM, 1971

HARVEY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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HARVEY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action to recover back military pay by a former enlistee in the United States Air Force.

Petitioner was granted a general discharge from the Air Force, effective September 23, 1948. In 1965, he applied to the Air Force Board for the Correction of Military Records for a change in his records to reflect an honorable discharge. On May 3, 1967, the Under Secretary of the Air Force directed that petitioner's military records be corrected to show that he was granted an honorable discharge on October 16, 1948, the date that his enlistment would have terminated had he not received the general discharge. Petitioner was fully compensated through October 16, 1948.

Petitioner instituted the present suit in the Court of Claims to recover pay and allowances as a member

of the military from October 16, 1948 through May 3, 1967. The Court rejected petitioner's contention and dismissed the suit (Pet. App. A.).

1. The decision below is correct. It has been consistently held that an illegally discharged serviceman is entitled to recover pay and allowance only to the date on which his term of enlistment would otherwise have expired. *Conn* v. *United States*, 376 F. 2d 879 (Ct. Cl.); *Middleton* v. *United States*, 170 Ct. Cl. 36; *Sofranoff* v. *United States*, 165 Ct. Cl. 470; *Clackum* v. *United States*, 161 Ct. Cl. 34; *Murray* v. *United States*, 154 Ct. Cl. 185.

2. Petitioner's reliance on *Bell* v. *United States*, 366 U.S. 393, is misplaced. In *Bell*, unlike the instant case, former prisoners-of-war sued for accrued pay from the time of their capture to the date of their discharge. The court merely held that under 37 U.S.C. 242—a statute that is not relevant to the present case—all prisoners of war are entitled to receive pay during captivity.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

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